Public Hearing on House Bill 1937
House Judiciary Subcommittee on Family Law

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Good Morning Chairwomen Delozier and Davis, and members of the House Judiciary Subcommittee on Family Law. I am Gail C. Calderwood, Immediate Past Chair of the Family Law Section of the Pennsylvania Bar Association. As an officer of the Section, I represent approximately 1,000 attorneys who are members of the Family law Section and will be impacted by H.B. 1397.

Family lawyers are somewhat unique among the ranks of attorneys, as we represent parties on both sides of cases, on occasion handling a case before one Judge while simultaneously arguing an opposite argument before a different Judge. We represent parties regardless of gender or family connection, and in the course of over twenty years of practice, in custody cases I have represented fathers, mothers, grandparents, aunts, uncles, great-grandparents, and third parties with no familial connection to the child or children in question. All family law attorneys can tell a similar tale, and the basis for our ability to argue seemingly opposite points within the same week or day is that each case is driven by unique facts and factors that impact the involved parties and children. No family or family structure is exactly alike, and a custody case involves arguably the most intimate and detailed analysis of all involved that will ever be endured by those who proceed through litigation. Yet, for every case that is litigated, countless others are resolved amicably with the assistance of attorneys and sometimes by the parties themselves.

Under current law, in every custody case the primary concern of the law is the best interests of the child or children. H.B. 1397 seeks to substantially amend the existing custody statutes in Pennsylvania. The primary purpose of the bill is to impose a presumption of shared physical and legal custody upon every family. The Pennsylvania Bar Association has formally opposed such a presumption in the past and remains steadfast in the same opposition today, as the child deserves to be the focus of the court system, the trier of fact and all involved, and that means a careful, thoughtful analysis of the issues that will impact that particular child, and a decision intended to serve the child's best interests.

Presumptions are dangerous in family law, and the law has moved away from the imposition of such presumptions over the decades. They create a situation that is parent centric rather than focusing on the needs of the child. Our system is a gender neutral one, and this allows fathers to seek primary custody and often to achieve shared custody. While there is certainly reason to believe that children in shared custody arrangements can thrive, and sometimes do better that children living in a partial or sole custody arrangement, that does not mean all children will thrive or do better in a shared custody situation.

Fathers are on equal footing in family law cases, contrary to the myth that the courts favor mothers. Where the mother does establish primary

physical custody, and the father has partial physical custody, it is often due to the dynamic the family established long before they entered a lawyer's office or a courtroom. However, even in cases where a father has not been as involved as the mother, perhaps was not making an effort to spend as much time with the children or was struggling to do so for various reasons, the court will consider shared custody as an option. In fact, arguably the trend is for more parents who enter the court system to be awarded shared custody. Nonetheless, statistics often are skewed, as many families never enter the court system. Many single family homes are created by choices or circumstances of the parties, and one parent is either uninvolved by choice or has simply disappeared from the child's life for various reasons.

Our laws provide the trier of fact, a Judge or appointed Master in certain cases, to make decisions that could result in parents enjoying shared custody, a parent enjoying partial custody while the other parent exercises primary custody, and in some cases a parent having sole custody of a child; and this allows our courts to craft a custody schedule meant to support the child or children and meet their individual needs, such as mental, emotional, health, educational and safety. Physical custody refers to the time a parent spends enjoying time with the child, while legal custody refers to the right to participate in major decisions that impact the child, including but not limited to education, medical, extracurricular, and religious decisions.

HB 1397, as drafted, eliminates most of these terms, in an effort to narrow the focus of the court to shared custody. Presently, shared physical custody is typically viewed by the courts and attorneys in Pennsylvania as equal (50/50) physical time, but it not required to be equal time. In light of our child support laws, it is often viewed as a physical schedule that allows a party to have somewhere between 40% to 50% of the overnight time available each month, outside of vacation and holidays. Eliminating the court's ability to be flexible in creating a schedule is counterproductive to the needs of a child(ren). Moreover, HB 1397 creates a presumption that shared physical and legal custody is in the best interests of every child, rebuttable only by clear and convincing evidence, and this presumption is problematic in many ways. It creates a high evidentiary bar to hurdle for the party seeking a different schedule due to the needs of the child. Judges shall likely interpret that standard to preclude most cases arguing for any deviation from equal, shared physical custody; and that outcome could harm children.

In many instances, a child's best interests will not be served by his or her parents exercising shared physical custody. This includes situations in which parties cannot communicate or agree upon even the smallest of decisions, exposing the child to high levels of conflict and distress, which is detrimental to the child. Other families have struggled with physical and/or mental abuse which create a barrier to shared physical custody, and some face a significant distance or travel time between households. The impact of a party's job that

requires frequent or extended travel, a child's special needs, and many other factors could weigh in favor of a partial/primary schedule for some families. Even in cases where one party has been shown to be interfering with the parent-child relationship, causing the child to oppose spending time with one parent, a sudden imposition of shared custody is not a cure all. In fact, counseling and a schedule that increases over time tends to be more effective in such cases. The courts should not be deprived of their ability to carefully craft a schedule that is meant to serve the child's needs.

In my long career as a family law attorney, I personally have represented fathers who were the primary caretaker and custodian of the children for various reasons, fathers who have been awarded primary physical custody while the mother enjoys partial physical custody, and fathers who have been awarded sole physical and legal custody of a child or children. In the same vein, I have participated in cases where a grandparent or aunt or uncle have primary custody, often due to the parents suffering from drug abuse, mental health issues or other incapacities.

In the case of a father raising his children for years due to mother suffering from mental incapacity or a severe personality disorder, HB 1397 would effectively force the children to spend half of their time with mother, even if she lacks parenting skills or lacks the ability to ensure the children's safety, and overcoming the evidentiary standard would be difficult to impossible in most cases. A parent could have zero contact with a child for the majority of that child's life but suddenly be facing shared custody time with a virtual stranger. The parent seeking to protect the child would have to partake in expensive and time consuming litigation to prove by "clear and convincing evidence" that the other parent should not benefit from the presumption.

HB 1397 creates the highest barrier possible to overcome the presumption, effectively introducing into the general custody arena the "clear and convincing evidence" which is the highest standard in a civil court case. Courts have defined it as evidence "that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue." *M.J.S. v. B.B. v. B.B., 172 A.3d 651, 660 (Pa. Super. 2017)*; and *In the Interest of: B.W., a minor appeal of: B.W. in re: M.M.-W., a minor appeal of: B.W. in the interest of: C.M.-W., a minor appeal of: B.W., no. 1634 WDA 2018, 2019 WL 2526161, at *5 (Pa. Super. Ct. June 19, 2019)* (nonprecedential). This burden of proof requires the plaintiff to prove that a particular fact is substantially more likely than not to be true. Some courts have described this standard as requiring the plaintiff to prove that there is a high probability that a particular fact is true.

It has also been described that, in order to meet the standard, witnesses must be found to be credible, the facts to which they have testified must be remembered distinctly, and their testimony be so clear, direct, weighty, and

convincing as to enable a judge to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. In family law, much of the testimony is "he said, she said" testimony with little to no underlying outside evidence, and meeting the civil law standard of clear and convincing evidence in most cases will be difficult to impossible as a result.

For good reason, this standard is applied sparingly in family law, such as in limited cases in which a third party, unrelated to the child, seeks custody time. For a parent with limited resources, who may have fled an abusive, controlling partner/spouse, or who has restricted time due to caring for a child with special needs, they may lack the means to build and present a case that could meet such a high standard. Moreover, this does not meet the needs of the children caught in these cases, as the court will be barred from weighing anything but overwhelming evidence.

While some members of the public believe that lawyers seek out or encourage litigation; the Family Law Section of the Pennsylvania Bar has taken positions in the past with respect to legislation that arguably negatively impact our potential income, but we do so in the interests of promoting better results and a fair judiciary system to all who enter. Family lawyers are concerned with helping families avoid costly and protracted litigation. Our Section also strives to assist in protecting the rights of all parties, including those who cannot afford an attorney.

HB 1397 will increase litigation, in several respects, as it creates a rigid basic structure for custody, eliminating the room for creative settlements and solutions. Parties shall become either fixated in achieving "shared" physical custody, leaving the parent with serious and/or valid concerns that such a schedule will negatively impact the child will have to pursue full litigation to overcome the presumption. The extremely high evidentiary standard will also lead to more litigation, discovery and contentious court cases. There is a strong likelihood that litigation will be more protracted and far more expensive for parties. Those parents who cannot afford counsel will be at a severe disadvantage given both the presumption and evidentiary standard, which they shall struggle to meet without any legal background. The Bill also invites an increase in grandparent or great-grandparent litigation for custody.

When referring to grandparent or great-grandparent custody I shall sometimes use the term grandparent which shall also encompass great-grandparents, as both have the potential for standing to pursue a custody claim under our custody laws. Grandparent custody is provided for in two sections of our current custody laws, HB 1397 seeks to alter the second section, §5325, which presently allows for grandparents to seek partial physical custody of a child under carefully defined circumstances. This portion of the law stands in contrast to §5324 which allows the same third party relations to seek primary or shared physical and/or legal custody of a child. The grounds

to seek "any form of physical or legal custody" as stated in §5324 are limited to a child that:

(A) Has been declared dependent under Juvenile Law;

(B) Is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or

(C) Has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home

Such a grandparent seeking primary or shared custody must also establish that the relationship between the child and the moving party started with the consent of at least one parent or a prior court order, and that the grandparents is assuming or is willing to assume responsibility for the child.

By contrast, a grandparent seeking partial physical or supervised physical custody of a child has a lower hurdle to clear, but still subject to limited circumstances, and must establish one of the following three circumstances in order to pursue a claim:

(1) The parent of the child is deceased;

(2) The relationship with the child began either with the consent of a parent of the child or under a court order

and where the parents of the child:

(i) have commenced a proceeding for custody; and

(ii) do not agree as to whether the grandparents or great-grandparents should have custody under this section;

OR

(3) When the child has, for at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home

HB 1397 would open the door to grandparents seeking shared physical custody, 40% to 50% of the overnights each month with the child, and this could be triggered by the death of one parent. The parent left defending against such a request would have to meet the extremely high evidentiary burden of "clear and convincing" evidence, and this could occur even if the child has no relationship with the grandparent in question. In the situation in which the parents have filed a custody action, the door is also opened potentially to an award for shared physical custody to a grandparent if the other parameters of subsection (2) are met. This leaves the two actual parents with only 50% to 60% of the physical custody time, unless they can overcome the presumption by surmounting the clear and convincing evidence standard.

Other matters impacted negatively by HB 1397 include the elimination of definitions for types of custody that the court shall impose in some cases, such as partial custody or supervised custody, even if HB 1397 were to be implemented. By eliminating the definitions, the proposed law would create ambiguity and confusion in custody matters.

The correction of reference to the Department of Public Welfare, the agency's former name, to the Department of Human Services in §5329.1(b) is a valid change to the law, but the alterations to the custody factors listed in §5328 are unnecessary and in some instances potentially harmful.

§5328(4) currently refers to "the need for stability and continuity in the child's education, family life and community life," but HB 1397 would strike the word "continuity." This is not only a paramount concern for some children, particularly some children with special needs, but this is an established concern for a child's well-being, reflected both in caselaw and as expressed by expert psychologists. It is one factor of many and can be outweighed by other considerations in cases, but it should not be eliminated from the custody factors.

While there has been a shift over time in custody cases toward more shared physical custody cases and most cases enjoying shared legal custody, it would be an error to assume that imposing shared custody as a presumption will lead all parents to be better parents or lead to improved conditions for all children.

For these reasons, the Pennsylvania Bar Association opposes HB 1397. Thank you for affording the PBA the opportunity to address HB 1397, and for your time and attention today.